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Supreme Court of The United States

OCTOBER TERM, 1955

No. .....

ROSEBUD COUNTY, MONTANA,

Petitioner,

vs.

MAY W. BENTLEY, RAYMOND L. RUSNAK and JOSEPH HOMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit, entered in the above case on February 1, 1956 (Appendix, p. 26), reversing a judgment of the United States District Court for the District of Montana, Billings Division (Appendix, p. ——). Order denying Petition for Re-Hearing entered March 14, 1956 (Appendix, p. 27).

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana, Billings Division, is not re-

ported (Appendix, p. 1). The opinion of the Court of Appeals for the Ninth Circuit is reported at 230 Fed. 2nd p. 1.

JURISDICTIONS

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Respondents brought an action in the United States District Court for the District of Montana, Billings Division, to quiet title to an interest in certain real estate situate in Rosebud County, Montana. The validity of the tax title proceedings whereby Rosebud County acquired possession of the property was put in dispute, as well as a 1948 judgment of the Montana Court which quieted title to the land in Roy M. King, purchaser and successor in interest to Rosebud County. The defense of laches was also interposed by the defendant Rosebud County. The lower Court decided the issue in favor of Rosebud County in holding the tax title proceedings conducted by the officials of Rosebud County valid, without determining other questions raised. The Court of Appeals reversed, holding the tax proceedings void and the 1948 judgment ineffective for failure to acquire jurisdiction as to May W. Bentley, one of the respondents.

The questions presented are: (1) Whether the tax title proceedings are void in view of the decisions of the Supreme Court of the State of Montana? (2) Whether the 1948 judgment of a Montana Court is without force and effect for failure to acquire jurisdiction? (3) Whether the Court of Appeals in reversing should have considered the defense of laches interposed?

STATUTES INVOLVED

Section 2209 of the Revised Codes of Montana of 1935. This section requires the purchaser of property sold for delinquent taxes to serve upon the owner of the property, and other named persons, a written notice setting forth certain prescribed matters and informing persons so served of the said purchaser's pending application for a tax deed.

Section 2212 of the Revised Codes of Montana of 1935. This section requires, before the issuance of a tax deed, the filing with the County Treasurer or other official of "an affidavit showing that the notice heretofore required to be given has been given as required."

Section 9482 of the Revised Codes of Montana of 1935 provides in part:

> "Service of Summons by publication, when. When any defendant specifically named in such complaint resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, or . . ., the plaintiff, upon the return of the summons showing due personal service upon all defendants specifically named in the complaint, other than such as come within the meaning of the foregoing provisions of this section, and upon filing with the clerk of said court an affidavit setting forth the facts with reference to any of such defendants upon whom personal service of summons within the state connot be made, within the meaning of the foregoing provisions of this section, may

obtain an order for the service of summons upon such defendants last mentioned, to be made by publication."

Section 9483 of the Revised Codes of Montana of 1935. This section prescribes the procedure to be followed in obtaining an order for publication, and, among other things, requires the filing of an affidavit with the clerk:

"... showing that he has made diligent search and inquiry for all persons who claim, or might claim, any right, title, estate, or interest in, or lien, or encumbrance upon, such real property,..."

Section 9484 of the Revised Codes of Montana of 1935 provides:

"Affidavit to show due diligence. The affidavit provided for in the two preceding sections shall clearly show that the necessary facts exist, and that the plaintiff has used due diligence in all respects as to which due diligence is required in such case by the preceding sections. The facts constituting due diligence shall be set out in said affidavit."

This section was repealed by Section 1, Chapter 8, Session Laws of Montana, 1945.

STATEMENT

May W. Bentley, one of the respondents, was the record owner of the land in question on August 24, 1939. She defaulted in the payment of the taxes. The officials of Rosebud County conducted a tax sale for the unpaid and delinquent taxes over a period of eight years—1935 through 1942. The County became the

purchaser at such sale and the County Treasurer of said County issued a tax deed conveying title to said property to said County. Subsequently, on May 17, 1947, Rosebud County quit claimed the property to Roy M. King and E. L. Grebe, of Sumatra, Montana, reserving to the County by reservation in the deed a royalty interest of 6¼% of all oil, gas and minerals recovered and saved from the land. Thereafter, on August 31, 1948, the said Roy M. King obtained decree of the Montana District Court for Rosebud County quieting title in King and purporting to bind May W. Bentley, and others.

By deed dated April 5, 1952, Respondent, May W. Bentley quit claimed one half of her interest to Respondent, Raymond L. Rusnak and Joseph Homan. The District Court below held (Appendix, p. 5):

> "In respect to the tax title proceedings and the matter of compliance with sections 2209 and 2212 of the Revised Codes of Montana, 1935, it appears that the affidavit herein provides such showing as the law required and is therefore sufficient until any such alleged fact is proven otherwise by competent evidence."

and cited the case of Milne v. Leiphart, 119 Mont. 263, 174 P. 2d 805 at pages 808, 809, wherein it is stated:

> "An affidavit was filed by the county clerk in the county treasurer's office showing that he deposited in the United States post office at Conrad an envelope containing a copy of the notice, by registered mail, postage prepaid, addressed to Harvey Leiphart, E. 724 Walton, Spokane, Washington. That was suf-

ficient proof to justify the county treasurer in issuing the tax deed . . ."

That is precisely the material allegations of the affidavit and proof of service filed with the treasurer in this case. See page 3 of the Court of Appeal's decision (Appendix, p. 13), wherein said affidavit is set forth, and for that reason the lower Court did not determine the other questions presented; but notwithstanding such decisions, the Circuit Court reversed, holding that the affidavit did not comply with Sections 2209 and 2212 of the Revised Codes of Montana of 1935, and that the case of Milne v. Leiphart had been overruled "sub silentio" by other cases decided by the Supreme Court of Montana.

The Circuit Court of Appeals further held that the 1948 judgment quieting title to the land in Roy M. King, successor in interest to Rosebud County, was "without force and effect" for failure to acquire jurisdiction as to May W. Bentley, basing its decision on the decision of the Supreme Court of Montana in the case of Aronow v. Anderson, 110 Mont. 484, 104 P. 2d 2. The Court did not discuss nor decide the defense of laches pleaded by Rosebud County.

Your petitioner petitioned the Court of Appeals for rehearing, which petition was denied by Order filed March 14, 1956 (Appendix, p. 27).

Federal jurisdiction was acquired by reason of diversity of citizenship and the amount in controversy in excess of $3,000.00.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the Court below has decided an important state question in a way in conflict with applicable state law.

I.

As to the first ground for review, it is respectfully submitted that the Milne v. Leiphart decision, supra, 119 Mont. 263, 174 P. 2d 805, is the law of the State of Montana and has not been overruled expressly or by implication, as suggested by the Court of Appeals, by the later decision of Perry v. Maves, 125 Mont. 215, 233 P. 2d 820. This is for the reason that the affidavit in the Leiphart case was materially different from the affidavit the Court was dealing with in the Maves case; whereas the affidavit in this case is almost identical with the affidavit in the Leiphart case. Furthermore, it is not consistent to hold that the Leiphart case "was overruled sub silentio by the later decision of Perry v. Maves", and at the same time not concede that the Leiphart case overruled "sub silentio" the cases preceding it.

There has been no contention in this case that the statutes of the State of Montana were not strictly complied with and that the notice referred to in the affidavit was not given for the time prescribed by law. To hold that the affidavit ommitting this recitation thereby voids the tax title proceedings as distinguished from rendering it merely voidable, is substituting shadow for substance.

To illustrate, it cannot be questioned that if a summons were issued out of the Court directed to be served on the defendant named therein not less than twenty days before his default, and it was returned by the Sheriff with his indorsement thereon to the effect that he had personally served a copy of the complaint and summons on the defendant, but failing to state when this service was made, none-the-less, any

judgment rendered by the Court would not be void for want of jurisdiction, but merely voidable only upon a showing within the time prescribed by the statute that the twenty day period had not elapsed from the date of service to the date of default. Clinton v. Miller, 124 Mont. 463, at page 479, 226 P 2d 487. Likewise, the recitation in the affidavit filed by the Clerk with the Treasurer of the fact of service of notice in the manner as required by the statute was sufficient proof to confer jurisdiction upon the Treasurer to issue the tax deed, and the defect in the affidavit of failing to state when this service was made renders the tax title proceedings voidable only, which must be taken advantage of within the period prescribed by the statute of limitations herein pleaded by Rosebud County in its answer.

Finally, if it is to be held that the Leiphart case was in fact overruled, still it is the law of this case, for it is well settled in the State Montana that such overruling is to be given prospective effect only. This was specifically held in the case of Montana Horse Products Co. v. Great Northern Railway Co., 91 Mont. 194 7 P. 2d 919, and Sunburst Oil & Refining Co. v. Great Northern Railway Co., 91 Mont. 216, 7 P. 927, affirmed on writ of certiorari to U. S. Supreme Court, 287 U. S. 358, 53 St. Ct. 145, 85 A. L. R. 254. Also see Volume XIII, Montana Law Review, pages 74 through 92, and decisions therein cited.

The author of this Law Review article, in commenting upon the Montana decisions in this respect, states on page 89, that it is:

> "firmly established . . . that where statutory or constitutional provisions are construed, any

> change in construction is to be given prospective effect only. Equally as well settled, and by many of the same cases since the two very frequently intertwine, is the proposition that where property or contract rights have vested, any change affecting them will be given prospective effect only."

and concludes:

> "... it would seem that in the interest of doing effective justice the general rule ought to be prospective overruling, with retroactive overruling the exception."

It is respectfully submitted that such ought to be the holding in this case, inasmuch as valuable property rights have vested in reliance upon the construction of the statutory provisions in the Leiphart case relating to the sufficiency of the affidavit to be filed with the County Treasurer. It is true that the Leiphart decision came after the filing of the affidavit in this case, but it is significant that the Leiphart case confirmed the type affidavit that was filed in this case, thereby precluding the necessity of any affirmative or remedial action by the County. This may be argued that it requires the Court to indulge in a presumption of reliance, which we believe is a safe presumption. However, in any event, it certainly requires no indulgence in any presumption to determine that the County relied on the decision of the Leiphart case in the instant case.

II.

The Circuit Court, in holding that the 1948 judgment quieting title to the land in Roy M. King, successor in interest to Rosebud County, was "without

force and effect" for failure to acquire jurisdiction as to May W. Bentley (Appendix, p. 13), in reference to Section 9482 of the Revised Codes of Montana of 1935, said:

> "In applying the statute we are controlled by the decision of the Supreme Court of Montana in the case of Aronow v. Anderson, 110 Mont. 484, 104 P. 2d 2."

This case is no authority for the sufficiency or insufficiency of the affidavit for publication in this case for two reasons. First, the affidavit there recited, as the Court below points out

> "That the following named defendants (including Anderson) reside out of the State of Montana and cannot be found within the State of Montana, and that the last known residence of Anderson is Shelby, Montana."

The Montana Court there said, at page 487 of the Montana Reports:

> "The naked allegation that defendant resides out of the state, without a statement as to where he does actually reside, is not sufficient without a recitation of the facts upon which the ultimate fact is based. This is particularly true in view of the fact, as here, that it is recited that Anderson's last known residence was Shelby, Montana, which negatives the idea that he was known to reside outside the State of Montana."

The affidavit for publication of summons in this case not only shows that the defendant resides out of the State but specifically alleges where the defen-

dant resides, to-wit: Madison, Wisconsin; and for that reason the case is not controlling.

Second, it is of particular significance to note that the Montana Court stated, as the lower Court points out, at 110 Mont. 484, 487, 104 P. 2d 2, 3, that:

> "It is our view that under section 9482 the affidavit must show the evidentiary facts upon which the ultimate fact is asserted that the defendant resides out of the state before a valid order for publication of summons can be made. If this were not so, there would have been no occasion for section 9484."

Shortly thereafter section 9484 was repealed by the Montana State Legislature by Section 1, Chapter 8, Session Laws of Montana, 1945. This section was repealed by that act **prior to the order for publication of summons based on the affidavit for the same** made in the 1948 judgment quieting title to the land in Roy M. King, successor in interest to Rosebud County, and for that reason the decision in Aronow v. Anderson is not controlling here.

III.

The lower Court entirely ignored the defense of laches interposed by Rosebud County. In asserting this defense we were not unmindful that the question of laches depends upon the peculiar factual situation of each case and is not governed by any hard and fast rules. However difficult it may be to apply this defense in any given case, it is none-the-less a well recognized one and accordingly ought to be determined in this case, particularly in view of the far reaching importance of the decision to the residents and taxpayers of Rosebud County and the people of Montana generally.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for Writ of Certorari should be granted.

Respectfully submitted,

RUSSELL K. FILLNER
County Attorney of Rosebud
County, Montana
Forsyth, Montana
Attorney for Petitioner

Of Counsel:
LYMAN BREWSTER
Birney, Montana

APPENDIX

APPENDIX A

OPINIONS BELOW

1. Opinion of District Court

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE DISTRICT OF MONTANA, BILLINGS, DIVISION

MAY W. BENTLEY, RAYMOND L. RUSNAK, and JOSEPH HOMAN,
Plaintiffs,

vs

ROSEBUD COUNTY MONTANA, a body corporate, ROY M. KING, sometimes ROY KING, and CELIA I. KING, his wife, and EDWARD L. GREBE, sometimes E. L. GREBE, and CAROLINE GREBE, his wife,
Defendants.

Civil Cause No. 1460

Filed January 14, 1955
H. H. Walker, Clerk.
By C. G. Kegel, Deputy.

This is an action to quiet title to real property. Defendant Rosebud County, Montana acquired (fee simple) title to the 640 acres of land involved herein, i. e., all of Section 15, Township 11 North, Range 32 East, M. P. M. by tax deed, the tax deed being issued by the County Treasurer of Rosebud County, Montana, to Rosebud County, Montana, under date of January 15, 1943, and showing a consideration of $159.60, which represented the duly assessed real property taxes on said land for the years 1935-36-37-38-39-40-41-42; unpaid and delinquent taxes over a period of eight years.

The abstract of title shows a quit claim deed dated May, 21, 1927, from Frank R. Bentley, to May W. Bentley, consideration of $1.00, having been filed on August 24, 1939, (which filing was over 12 years after execution of said deed), conveying the land involved herein; and a quit claim deed, dated June 5, 1933, from Northern Pacific Railway Company, a corporation to "Owner of the said land", consideration of $1.00, conveyed "all mineral and rights of mining heretofore reserved by first party, to-wit: * * *.", describing the land involved herein.

Counsel filed stipulation of facts at the time of the trial and the following certified photostatic exhibits were offered and received in evidence:

Exhibit "A", County Treasurer's Certificate of Tax Sale, Numbered "B" No. 3031, dated July 15, 1936;

Exhibit "B", Tax Deed, Dated January 15, 1943, from the County Treasurer of Rosebud County to Rosebud County, Montana, certified by the County Clerk and Recorder, which contains pertinent facts set forth in Exhibit "A";

Exhibit "C", Contract for Deed, dated May 20, 1943, between Roy M. King and E. L. Grebe, and the Board of County Commissioners of Rosebud County, Montana, for purchase of said land, certified by County Clerk and Recorder.

Exhibit "D", consists of the following instruments certified by the County Clerk and Recorder:

Affidavit and Proof of Service, dated January 4, 1943;

Notice of Application for Tax Deed, dated October 13, 1942, To: May W. Bentley;

Affidavit of Publication, dated December 8, 1942, re: Notice of Application for Tax Deed, publication having been made on November 12th and 19th, 1942;

Envelope with return address "Guy W. Gray, Clerk and Recorder, Rosebud County, Forsyth, Montana", addressed to "May W. Bentley, Madison, Wisconsin", with postmarks and stamps thereon;
Receipt for Registered Article No. 558, from County Clerk addressed to May W. Bentley, Madison, Wis.
Entry of filing of above instruments on January 15, 1943, by County Clerk and Recorder, Rosebud County, Montana.

Exhibit "E", consists of the following instruments certified by the County Treasurer:

Request for tax deed, dated January 15, 1943, by Clerk and Recorder to County Treasurer, Rosebud County, Montana;

Affidavit and Proof of Service, dated January 4, 1943, by County Clerk;

Notice of Application for Tax Deed, To: May W. Bentley, dated October 13, 1942, Rosebud County, Montana, By Guy W. Gray, Clerk and Recorder;
Entry of filing of above instruments on January 15, 1943, by Deputy County Treasurer, Rosebud County, Montana.

Exhibit "F", Quit Claim Deed, dated May 15, 1947, from Rosebud County, Montana, to Roy M. King and E. L. Grebe, of Sumatra, Montana, certified by County Clerk and Recorder.

On October 16, 1947, an action was instituted in State Court in the Sixteenth Judicial District in and for

Rosebud County, Montana, by Roy M. King, Plaintiff, vs. William LaFurge, et al., (and May W. Bentley included) for the purpose of quieting title in and to "All of Section 15, Township 11 North, Range 32 East, M. P. M.," and judgment and decree signed and filed on August 31, 1948, to which further reference is hereinafter made.

Thereafter this action in federal court was commenced on January 6, 1953, by May W. Bentley, the former owner of record, and Raymond L. Rusnak and Joseph Homan, who by a Quit Claim Deed & Assignment, dated April 5, 1952, and filed January 14, 1953, for a consideration of $100.00, acquired a one-half interest in and to the title or claim for title of May W. Bently in the land involved herein, and was designated as an action to quiet title in fee simple absolute against any claims of the said defendants named herein to the said land.

It appears that in the County Treasurer's Certificate of Tax Sale, dated July 15, 1936, that the said real property was described as follows: "All Sec. 15-11-32."

Plaintiffs contend that such a designation of description is insufficient, and, therefore, the tax deed is invalid, and cite various authorities to the effect that where there is ambiguity and uncertainty such defects cannot be cured by evidence aliunde; citing Miller v. Murphy, 119 Mont. 393, 175 Pac. 2d, 182; and reference is made to decisions in other States than Montana under statutes considered comparable to the Montana statute.

"Defendant Rosebud County distinguishes from the Miller case, supra, and other cases cited by plaintiff, stating that in the Miller case the defective descrip-

tion was in the notice of application for tax deed, while in this case the abbreviated description was in the certificate of sale from the County Treasurer of Rosebud County to Rosebud County, Montana, and that the land as described in the assessment, notice of application for tax deed and the tax deed itself all contained the full description, i. e., "All of Section 15, Township 11 North, Range 32 East, M. P. M.,; that the certificate of sale is not notice to the owner that his property is for sale, nor to bidders that the land the notice of sale was properly given as provided by is to be sold but is given after the land is sold, and that Section 2182, R. C. M. 1935. Section 84-4124, R. C. M. 1947, as amended and re-enacted by Section 1, Chapter 170, Laws of 1947, provides for validation with respect to certificates of sale as therein set forth. It further appears from the testimony of an expert witness in the field of civil engineering that the description in the certificate of tax sale is certain, and could not refer to any land other than the land described in the tax deed. In view of the foregoing it would seem to the court that the description used in this instance in the said certificate is not such an insufficient or ambiguous description as would invalidate the tax deed herein, **and such is the finding of the court."**

> "In respect to the tax title proceedings and the matter of compliance with Sections 2209 and 2212 of the Revised Codes of Montana, 1935, it appears that the affidavit herein provides such showing as the law required and is therefore sufficient until any such alleged fact is proven otherwise by competent evidence."

The affidavit filed in the office of the County Treasurer states that the County Clerk and Recorder served a copy of the attached notice upon the owner of the property, namely, May W. Bentley, by depositing in the Postoffice at Forsyth, Montana, an envelope containing a copy of said Notice, securely sealed, with postage both regular and for registration thereon, and marked "Return Receipt Requested"; said envelope being addressed as follows: "May W. Bentley, Madison, Wis."

The registered letter was addressed to the post office address of said owner as disclosed by the records in the office of the County Clerk and Recorder, as required by Section 2209. However, said Section 2209 further provides for publication,

> " * * * provided, that in all cases where the post office address of the owner, mortgagee, or assignee is unknown, the applicant shall publish once a week for two (2) successive weeks * * *."

The affidavit then states that the said letter was returned and is on file in the office of the County Clerk of Rosebud County, Montana; that he caused to have a notice of application for tax deed published in the Forsyth Independent for two consecutive weeks as is further shown by affidavit of publication which is on file in the office of the County Clerk of Rosebud County, Montana. In this case the records show, whether it was necessary or not, valid service was also effected by publication.

Plaintiff's counsel concedes that the Notice of Application for Tax Deed to May W. Bentley was attached to the Affidavit and Proof of Service and made

a part thereof so that it could be considered by the County Treasurer with respect to service of notice by said registered letter and also service of notice by said publication; in said notice, dated October 13, 1942, it is stated: "That the period within which the said above described lands and premises may be redeemed from the sale to pay the taxes for the year 1935 has long since expired, and that the undersigned, will, on the 15 day of **Jan., 1943,** which will be at least sixty (60) days after the service of this notice upon you, make application to the Treasurer of Rosebud County for tax deed to be issued to it as provided by law. * * *."

Counsel for defendant relies upon the case of Milne v. Leiphart, 119 Mont. 263, 174 Pac. 2d 805, at pages 808, 809, wherein it is stated:

> "An affidavit was filed by the county clerk in the county treasuer's office showing that he deposited in the United States post office at Conrad an envelope containing a copy of the notice, by registered mail, postage prepaid, addressed to Harvey Leiphart, E. 724 Walton, Spokane, Washington. That was sufficient proof to justify the county treasurer in issuing the tax deed. * * *."

It does not appear in the record there is any proof made that the notice required by Section 2209, supra, was not given, and with respect to proof this said Section also provides, in part, as follows:

> " * * * In all cases due proof of service of notice in whatever manner given, supported by the affidavit required by law, must be filed immediately with the clerk and recorder of

the county in which the property is situated, and be kept as a permanent file in his office, and such proof of notice when so filed shall be prima facie evidence of the sufficiency of the notice."

It is evident from the tax deed that in the procedure of the issuance and execution of said tax deed the County Treasurer, Bert Shotwell, personally appeared before the County Clerk and Recorder, Guy W. Gray, for the acknowledgment of the signature of the County Treasurer in his execution of said tax deed on January 15, 1943, which reads, in part" " * * * the said grantee has given the necessary notice of application for tax deed as required by law. * * *." The instruments in Exhibit "D' herein at that time were on file in the office of the County Clerk and Recorder and available for inspection, as public records, by the County Treasurer, when he personally appeared in that office for inquiry or question with respect to authority or jurisdiction or any other purpose, so that it would seem, in addition to the proof made herein, the maxim is applicable that means of knowledge and knowledge itself are, in effect, the same thing.

The above quoted portion of the said notice, which was attached to and made a part of the required affidavit, and so conceded, as mentioned hereinbefore, to have been properly considered by the County Treasurer sets forth the requirements of Section 2209, supra, and the affidavit recited the registered letter containing said notice was actually mailed, and also he caused said notice to be published, as shown by the affidavit of publication filed in the office of the County Clerk and Recorder, which said affidavit, when read in con-

junction with the notice, makes the showing required by Section 2212, Revised Codes of Montana, 1935.

There is a question raised by the plaintiffs herein as to whether or not such time element of notice as shown by the affidavit and notice, when read in conjunction with each other, was actually given to meet the requirements of the statute in the determination of the County Treasurer. In this respect it would also seem proper to state that, of course, if the affidavit or instruments filed in the County Treasurer's office were false, anyone adversely affected thereby would have grounds for redress, and this is also true with regard to the affidavit and instruments filed in the County Clerk's office showing the proof of service of notice.

It is to be noted that Section 2209, supra, requires that due proof of service of notice be filed with the County Clerk, whereas, Section 2212, supra, does not require due proof of service to be filed in the office of the County Treasurer; all that is required is the filing of "an affidavit showing that the notice hereinbefore required to be given has been given as herein required."

In the case of Cavitt v. Seirson, et al., (1946), 119 Mont. 437, 175 P. 2d 767, it is stated the statutory presumptions "subsections 15 and 33 of section 10606, R. C. M. 1935, providing| "15. That official duty has been regularly performed." "33. That the law has been obeyed.", were applicable, when grounded upon an established fact, with respect to the record failing to show whether or not the county clerk made and filed with the county treasurer the affidavit required by section 2212, and that such proof not appearing in the

record the county treasurer was without authority to issue the tax deed. But in this instance, while there are established facts, i. e., all the necessary instruments of proof on file as public records, it does not seem that there was any presumption on the part of the County Treasurer.

The request for tax deed, dated January 15, 1943, which is the same date on which the said tax deed was executed, is a part of Exhibit "E" herein, and was filed with the County Treasurer by the County Clerk and Recorder, under his official seal, and sets forth a resume of all of the proceedings had pertaining to said land, including the official statement " * * * and the time of redemption having elapsed, being five years from date of sale, and sixty days having elapsed since the giving of Notice of Application for Tax Deed, * * *."

In view of the foregoing it does not appear necessary to give consideration to the contentions of the plaintiffs with respect to the quiet title action instituted in State Court on October 16, 1947, in Roy M. King, Plaintiff, vs. William LaFurge, et al., because it pertains to the title to the same land as was involved in the prior tax title action, and it also included May W. Bentley and Rosebud County, Montana, et al., as parties defendant; it was apparently an additional safeguard after purchase of the tax title from Rosebud County, Montana, hence, any contentions of defects of any kind in that quiet title action could not be intermingled to defeat or affect the validity of the title acquired by Rosebud County, Montana, by the tax deed; it should be noted with respect to the status or relationship of the defendant Rosebud County herein

that this action involves only one cause of action on the issue of title, that there is but one title to the said land and the reservation of 6 1-4% royalty to said county is a reservation out of the title transferred by quit claim deed from Rosebud County, Montana, to Roy M. King and E. L. Grebe; said deed being Exhibit 'F" herein.

The case was tried May 25, 1954, and counsel were given 40 and 20 days for briefs after receipt of transcript. When plaintiffs filed their reply brief on October 6, 1954, they also filed a stipulation for voluntary dismissal with prejudice between the plaintiffs and the defendants Roy M. King, Celia I. King, Edward L. Grebe and Caroline Grebe, and also on October 6, 1954, the order submitted was signed by the court, with each party to bear his own costs, providing: " * * * the said named defendants stipulate that they have compromised and settled all claims to the real property described in the plaintiffs' complaint, and that there are no issues remaining between the said plaintiffs and the said named defendants, and that the said named defendants have no interest in the claim between the plaintiffs and defendant, Rosebud County, Montana, a body corporate, to a 6 1-4% royalty of all oil, gas and minerals recovered and saved and to be recovered and saved from the lands described in the plaintiffs' complaint." "It is hereby ordered that the plaintiffs' complaint so far as it pertains to the defendants named in the said stipulation is dismissed with prejudice, and the Answer and Amended Answer of the said named defendants, and the affirmative defenses therein, are likewise dismissed with prejudice, and each party is to bear his own costs. * * *."

In view of the consideration of the evidence herein and the findings of the court it becomes evident that the court is of the opinion the proceedings conducted by the officers of Rosebud County to obtain a tax deed to the tract of land in question, to said county, disclose a sufficient compliance with the requirements of the laws applicable thereto and are therefore valid and thereby render the tax deed issued by the County Treasurer to Rosebud County a valid instrument; that the stipulation of dismissal with prejudice between plaintiffs and certain of the defendants, and the order entered thereon, do not affect the issue of title to be determined by the court, and such is the decision of the court herein. Exceptions allowed counsel. Findings of fact and conclusions of law and form of judgment may be submitted by counsel.

CHARLES N. PRAY
Judge

2. Opinion of Circuit Court

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MAY W. BENTLEY, RAYMOND L. RUSNAK and JOSEPH HOMAN,

Appellants,

vs.

ROSEBUD COUNTY, MONTANA

Appellee.

No. 14,693

Feb. 1, 1956

Appeal from the United States District Court for the District of Montana, Billings Division.

Before: ORR and LEMMON, Circuit Judges, and HARRISON, District Judge.

ORR, Circuit Judge:

Appellants brought an action in the District Court to quiet title to an interest in certain real estate situate in Rosebud County, Montana. The question posed for

solution is whether there was a sufficient compliance with applicable Montana law in affidavits made by officials of Rosebud County to authorize the county treasurer of that County to convey title to the property in question by tax deed.

Mrs. Bentley, one of the appellants, was the owner of the property attempted to be conveyed. She defaulted in the payment of taxes. The officials of Rosebud County conducted a tax sale. The County became the purchaser and the county treasurer of said county issued a tax deed purporting to convey title to said property to said County. The validity of the tax deed is in dispute.

On May 17, 1947 Rosebud County quit claimed the property to Roy M. King and E. L. Grebe of Sumatra, Montana, reserving to the County, by reservation in the deed, a royalty interest of six and one quarter per cent of all oil, gas and minerals recovered and saved from the said land. Thereafter, on August 31, 1948, the said Roy M. King obtained a decree of the Montana District Court for Rosebud County quieting title in King and purporting to bind May W. Bentley and others.

By deed dated April 5, 1952 appellant May W. Bentley quitclaimed one half of her interest to appellants Raymond L. Rusnak and Joseph Homan. The instant appeal concerns the conflicting claims of appellants and Rosebud County to oil, gas and mineral rights which have become very valuable by reason of the discovery of oil on the property.

Appellants rely on sec. 2209, Revised Code of Montana, 1935[1] in force at the date of the issuance of the

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[1] Sec. 84-4151, Revised Codes of Montana, 1947.

said tax deed. This section requires the purchaser of property sold for delinquent taxes to serve upon the owner of the said property and other named persons a written notice setting forth certain prescribed matters and informing persons so served of the said purchaser's pending application for a tax deed. Sec. 2209.1[2] makes this procedure applicable to tax deed purchases by a county. Notice is required to be given by registered mail at least sixty days in advance of the date of issuance of the tax deed. In the event the owner's post office address is unknown the statute requires the purchaser to publish the said notice once each week for two successive weeks in a newspaper published in the county where the property is situated, the first publication of the notice to be made at least sixty days in advance of the issuance of the said tax deed.

Sec. 2212, Revised Codes of Montana, 1935,[3] requires, before the issuance of a tax deed, the filing with the county treasurer or other officer of "an affidavit showing that the notice heretofore required to be given **has been given as required,**" emphasis added. Appellants maintain that the affidavit filed before the issuance of the tax deed in the instant case failed to satisfy the requirements of secs. 2209 and 2212 supra,

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[2] Sec. 84-4152, Revised Codes of Montana, 1947.
[3] Sec. 84-4156, Revised Codes of Montana, 1947. The section was amended by Sec. 1, Ch. 17, L. 1947.

and therefore renders the purported sale invalid. The contents of the affidavit are set forth in note 4.

The affidavit sets forth that the notice of application was published in a newspaper in Forsythe, Montana for two successive weeks, however, there is no averment that the first publication was made sixty or more days in advance of the date of the tax deed as is required by sec. 209. The affidavit makes reference to records in the office of the clerk but this reference will not suffice because the treasurer is limited in his determination of what has transpired to an inspection of the documents before him which must of themselves affirmatively establish all facts necessary to his au-

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[4] "Affidavit and Proof of Service

Guy W. Gray, being duly sworn, on oath deposes and says:
That he is the duly elected, qualified and acting County Clerk of Rosebud County, Montana;

That May W. Bentley, named in the Notice of Application for Tax Deed attached hereto, is the owner of the property described therein, and that ...., and that no other person, firm or corporation owned or held any portion of said property, or any other mortgage thereon, according to a search of the Rosebud County records;

That he served a copy of the attached notice upon May W. Bentley by depositing in the post office at Forsythe, Montana, an envelope containing a copy of said Notice, securely sealed with postage both regular and for registration thereon, and marked 'Return Receipt Requested', said envelope . . . being addressed as follows:

May W. Bentley, Madison, Wis.,

That the said letter . . . was returned and is on file in the office of the County Clerk of Rosebud County, Montana;

That he caused to have a notice of application for tax deed published in the Forsythe Independent for two consecutives weeks as is further shown by affidavit of publication which is on file in the office of the County Clerk of Rosebud County, Montana;

That the property described in said Notice is unoccupied;

That the property described in said Notice of Application for tax deed, for which Rosebud County claims title because of unpaid taxes thereon, pursuant to Sec. 2209 of the 1935 Revised Codes of the State of Montana, as amended by Chapter 105 of the 1939 Session Laws of the State of Montana, is as follows, to-wit:

All Section 15, Township 11 N. Range 32 E. M. P. M.

Guy W. Gray
County Clerk.

Subscribed and sworn to before me this 4th day of January 1943.

J. J. McIntosh
Notary Public for the State of Montana
Residing at Forsythe, Montana.
My Commission expires August 14, 1943."

(Seal)

thority to issue a tax deed, Perry v. Maves, 125 Mont. 215, 233 P. (2d) 820. Nor is the missing averment supplied by statements made in the Notice of Application for Tax Deed, a copy of which was attached to the affidavit and was filed with the county treasurer. This application contained a statement that application for a tax deed would be made sixty days after service of the notice. That notice was drafted and dated before the publication required by the statute, at a time when the date of publication could not have been known. The statement at most constitutes an expression of intention to comply with the statutory prescriptions.

In summarizing the numerous cases in which it has considered the proper construction to be placed upon the above-cited statutes, the Supreme Court of Montana declared as follows, Perry v. Maves, supra, at 233 P.2d 820, 821:

> "Proceedings on tax sales are **in invitum** Every essential or material step prescribed by the statute must be strictly followed. If the requirements of the statute are not strictly followed the sale may be avoided. In the county treasurer's proceedings to sell the land there is no distinction recognized between the mandatory and directory requirements of the statute. The county treasurer must act as the statute directs. Otherwise he acts without authority and the purported sale which he assumes to make is invalid. This holds true though the requirement with which the county treasurer failed to comply was not one exacted for the protection of the owner of the land.

"In Jensen Livestock Co. v. Custer County, 113 Mont. 285, 295, 296, 124 P.2d 1013, 1018, 140 ALR 658, this court held that 'The county treasurer's jurisdiction to issue a tax deed must rest upon the affidavits of service required by the legislature to be filed with him.' There, speaking through Mr. Chief Justice Johnson, this court further said: 'Furthermore the treasurer was or was not authorized to issue the deed. * * * Under the statute his jurisdiction arises solely from the affidavits of service which are filed with him, and not merely from the fact of service or from his knowledge of it otherwise than through the affidavits. * * * In other words the treasurer has no jurisdiction to issue a tax deed until there has been filed with him an affidavit showing that the notice hereinbefore required to be given has been given as **herein required,**' etc. Cullen v. Western Mortgage & Warranty Title Co., 47 Mont. 513, 134 P. 302; Gallash v. Willis, 90 Mont. 148, 300 P. 569; Sanborn v. Lewis and Clark County, 113 Mont. 1, 120 P.2d. 567. 'In determining the sufficiency of tax title proceedings the record alone may be considered and defects or omissions may not be corrected by anything dehors the record.' Harrington v. McLean, 70 Mont. 51, 223 P. 912, 914; Fariss v. Anaconda Copper Mining Co., D. C., 31 F. Supp. 571, 576."[5]

[5] See also Lowery v. Garfield County, 122 Mont. 571, 208 P.2d 478; Ross v. First Trust and Savings Bank, Mont., 123 Mont. 81, 208 P.2d 490 and Mitchell v. Garfield County, Mont., 123 Mont. 115, 208 P.2d 497.

In Perry v. Maves the court held that one who is properly served in a tax court proceeding, but as to whom the affidavits before the county treasurer who issues the deed do not affirmatively show full compliance with the statutory procedures for service of notice, is not bound by the tax deed proceedings and may have the deed declared invalid by instituting thereafter an action to quiet title in his own name.

In the instant case the affidavits before the county treasurer failed to show service by publication sixty days prior to the issuance of the tax deed as required by sec. 2209, supra. Hence, under the rule of the Perry case the tax deed is fatally defective.

But, appellee argues that under the holding in Milne v. Leiphart, 119 Mont. 263, 174 P.2d 805, the affidavit is sufficient. In the Milne case a side issue was presented as to the sufficiency of the affidavits filed with the county treasurer. Whether or not the affidavits failed there to show the date of the personal service of notice there had does not expressly appear. In the Milne case the court held that the affidavit before it was sufficient to justify the county treasurer in issuing a tax deed. There was no discussion or citation of authorities on the question of sufficiency. If we assume, as does the appellee, that the affidavit in the Milne case did not state the date of the service of notice but was nevertheless held sufficient we are persuaded that the Milne holding is contrary to the consistent approach adopted in the other Montana cases cited in the quoted passage supra, both earlier in time to Milne and subsequent thereto. We think the Milne decision was overruled sub silentio by the later decision of Perry v. Maves.

The appellee urges consideration of that part of sec. 2209 supra, which reads as follows:

> "In all cases due proof of service of notice in whatever manner given, supported by the affidavit required by law, must be filed immediately with the clerk and recorder of the county in which the property is situated, and be kept as a permanent file in his office, and such proof of notice when so filed shall be prima facie evidence of the sufficiency of the notice."

This section does not preclude the necessity of filing an adequate affidavit. The sufficiency of the notice itself, the sole matter with which the quoted provision purports to deal, is not the issue here. The section is not applicable.

A defense of estoppel is interposed. It is claimed that appellants are estopped to assert the invalidity of the tax deed proceedings because of the 1948 judgment of a Montana court which, as heretofore noted, quieted title to the land in Roy M. King, successor in interest to Rosebud County. Appellant's answer is that May W. Bentley was not properly served in the former quiet title action and that therefore the court was without jurisdiction to include her in its decree; secondly, that Rosebud County was not subject to the jurisdiction of the court for the reason that the statutory procedure for service of process on a county was not followed and therefore, under the doctrine of mutuality, the county may not assert the defense of estoppel by judgment and finally, that even though both parties became subject to the jurisdiction of the court in the former action they were not there adversaries

and therefore neither may assert the defense of res judicata against the other. We believe the first contention disposes of this defense.

The service of process on May W. Bentley in the former action was made by publication. Sec. 93-6202, Revised Codes of Montana, 1947, former section 9482, Revised Codes of Montana, 1935, describes the manner in which authorization for publication of summons in actions to quiet title may be had.[6] Sec. 93-6207, Revised Codes of Montana, 1947, former sec. 9483, Revised Codes of Montana 1935, prescribes procedures to be followed in obtaining an order for publication.

In applying the statute we are controlled by the decision of the Supreme Court of Montana in the case of Aronow v. Anderson, 110 Mont. 484, 104 P.2d 2. There it was held that a former judgment in an action to quiet title where service had been made by publication will be set aside upon a showing that the affidavit filed in support of the motion for an order allowing service by publication failed to fulfill the statutory requirements of setting forth the evidentiary facts supporting the conclusion that the defendant resides out of the state. The affidavit in the Aronow case stated, 104

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[6] "Service of Summons by publication, when. When any defendant specifically named in such complaint resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, or . . ., the plaintiff, upon the return of the summons showing due personal service upon all defendants specifically named in the complaint, other than such as come within the meaning of the foregoing provisions of this section, and upon filing with the clerk of said court an affidavit setting forth the facts with reference to any of such defendants upon whom personal service of summons within the state cannot be made, within the meaning of the foregoing provisions of this section, may obtain an order for the service of summons upon such defendants last mentioned, to be made by publication."

The omitted portion of this section deals with service of summons on absentee corporations. Sec. 93-6206 was amended by sec. 1, Ch. 66, L. 1949 and again by sec. 1, Ch. 229, L. 1953, which amendments prospectively eased the stringency of the earlier rule, which, however, must govern this case. See Revised Codes of Montana, Vol. 7, 1955 Cumulative Pocket Supplement, sec. 93-6206.

P.2d 2, 3, "That the following named defendants (including Anderson) reside out of the State of Montana, and cannot be found within the State of Montana, and that the last known residence of Anderson is Shelby, Montana." The court said, 104 P.2d 2, 3:

> "It is our view that under section 9482 the affidavit must show the evidentiary facts upon which the ultimate fact is asserted that the defendant resides out of the state before a valid order for publication can be made. If this were not so, there would have been no occasion for section 9484 . . . "

In the instant case the affidavit in support of the motion for publication, so far as pertinent to May W. Bentley, averred only that May W. Bentley last resided at Madison, Wisconsin, and that diligent search had been made in and around Rosebud County as to the address of the unserved defendants and "they cannot be determined . . ." These averments are conclusions analogous to those found insufficient in the Aronow case, supra. Moreover, a comparison of the affidavit with the four conditions set forth in sec. 93-6206, supra, discloses that it fails to aver, even by way of conclusion, matter sufficient to satisfy any of the required conditions. The court failed to acquire jurisdiction as to May W. Bentley and the decree, as to her interests is without force and effect.

In the case of West v. Capital Trust and Saving Bank, 113 Mont. 130, 124 P.2d 572, the Supreme Court of Montana recognized that where, as here, it affirmatively appears on the record of a prior case upon which a party seeks to assert an estoppel that the court in the former action acted beyond its jurisdiction, the judg

ment of the former action may be collaterally attacked. There, as in the instant case, the first action was a suit to quiet title and the second action was a subsequent suit to quiet title brought by one who had been named as a party defendant in the first action. The plaintiff in the second action was allowed to attack the former judgment, the court stating, 124 P.2d 572, 576:

> "The rule is stated in 34 C.J. 551, as follows: Where the facts upon which a court assumes jurisdiction are recited in the record and appear by it to have been such as would not in law confer jurisdiction, the judgment may be impeached collaterally; for in that case there can be no presumption, in aid of the judgment, that the recitals of the record are incorrect or incomplete, or that something was done which the record does not show to have been done, the whole record being taken together for this purpose. Thus where the record recites that the defendant was duly served with process, but the record shows that no service was made, or shows a service which is insufficient and unauthorized by law, it may be collaterally impeached."

The court permitted the former judgment to stand for the reason that the judgment roll before it did not affirmatively show a want of jurisdiction. In the case at bar want of jurisdiction affirmatively appears.

The appellee relies on the case of Clinton v. Miller, 124 Mont. 463, 226 P.2d 487, in support of his contention that, notwithstanding what was said in Aronow v. Anderson, supra, failure by an affiant to set forth the

facts evidencing the conclusions upon which a motion for an order for service by publication is based does not go to the question of the jurisdiction of the court. That case, however, is not in point. The affidavit there considered was the affidavit required to be filed after completion of service stating the manner in which service had been made. The case did not deal with the sufficiency requirements of an affidavit filed before service and supporting a motion for service by publication such as we consider here, and such as was considered in Aronow v. Anderson. The opinion in the Clinton case itself recognizes this distinction. The court emphasized, 226 P.2d 487, 495, 496, that there service had been made and jurisdiction attached prior to the filing of the affidavit there considered and concludes only that a faulty affidavit of service could not divest the court of jurisdiction already attached.

There is no merit in appellee's contention that May W. Bentley was bound by the 1948 decree, despite improper service, because that action was in rem and against all the world. The Montana statute classifies defendants in actions to quiet title into two categories, known and unknown, sec. 93-6204, Revised Codes of Montana, 1947. Pursuant to this section the plaintiff may name all known persons who assert an adverse claim. May W. Bentley was specifically named. Under the provisions of sec. 93-6206, supra, any defendant specifically named must be served as prescribed, see secs. 93-6202 and 93-3067. Failure to follow the statutory prescriptions is jurisdictional, sec. 93-6210. The provision binding parties not named in the complaint applies only to unknown parties, sec. 93-6211.

We are persuaded that the purported tax deed issue

to Rosebud County was not valid and did not convey any interest, that the Montana court in the 1948 action had no jurisdiction over the appellant May W. Bentley and that, the absence of jurisdiction affirmatively appearing on the judgment rolls here in evidence, the former judgment is not a bar to the assertion by appellant of her title to the property in suit.

Judgment reversed.

(Endorsed:) Opinion. Filed Feb. 1, 1956. Paul P. O'Brien, Clerk

APPENDIX B

1. Judgment of Court Appeals

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MAY W. BENTLEY, RAYMOND L. RUSNAK and JOSEPH HOMAN,
Appellants,

No. 14,693

vs.

ROSEBUD COUNTY, MONTANA,
Appellee

JUDGMENT

Appeal from the United States District Court for the District of Montana, Billings Division.

This cause came on to be heard on the Transcript of Record from the United States District Court for the District of Montana, Billings Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellants, and against the Appellee.

IT IS FURTHER ORDERED that the appellants recover against the Appellee for their costs herein expended and have execution therefor.

(ENDORSED) Judgment

Filed and Entered February 1, 1956

PAUL P. O'BRIEN, Clerk.

2. Order Court of Appeals Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpts from Proceedings of Wednesday, March 14, 1956. Before: ORR and LEMMON, Circuit Judges, and HARRISON, District Judge.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the Petition of Appellees, filed March 2, 1956, and within time allowed therefore by rule of Court for a rehearing of the above cause, be and hereby is denied.

3. Clerk's Certificate

(Title of Court and Cause)

CERTIFICATE OF CLERY, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 21 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty - five (65) pages, numbered from and including 1 to and including 65, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the Appellee, and certified under Rule 21 of the Revised Rules of the Supreme Court of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit,

at the City of San Francisco, in the State of California, this thirteenth day of April, 1956.

(Sel)

/s/ PAUL P. O'BRIEN
PAUL P. O'BRIEN, Clerk

MAY 23 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1955

No. 962

ROSEBUD COUNTY, MONTANA,
Petitioner

vs.

MAY W. BENTLEY, RAYMOND L. RUSNAK and JOSEPH HOMAN,
Respondents

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

Brief of Respondent in Opposition to Petition for Writ of Certiorari

Of Counsel:

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Billings, Montana

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Securities Building,
Billings, Montana,
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BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Introduction

Respondents submit that little can be added to the unanimous opinion of the Circuit Court of Appeals in order to make it a complete answer to Petitioner's application for writ of certiorari to issue from this Court. This case is simply an action to quiet title to certain lands in Montana brought by the original owner of said lands and her grantees. Involved therein were questions concerning the sufficiency or non-sufficiency of certain Montana tax title proceedings, and the defenses of estoppel and laches. The Circuit Court's decision and opinion contain no deviation from established principles of law which have existed in Montana for many years.

I.

Question Concerning Validity of the Tax Deed

The Circuit Court of Appeals found that the tax title proceedings by which Petitioner purportedly acquired an interest in said lands were invalid. The affidavit required by *Sec. 2212, Revised Codes of Montana, 1935 (Sec. 84-4156, Revised Codes of Montana, 1947)* failed to show service by publication sixty days prior to the issuance of the tax deed as required by *Secs. 2209 and 2209.1, Revised Codes of Montana, 1935 (Sec. 84-4151 and 84-4152, Revised Codes of Montana, 1947).* The tax title proceedings were therefore invalid as to the Respondent, May W. Bentley. *Perry v. Maves,* 125 Mont. 215, 233 P (2d) 820.

The Petitioner argues that the affidavit in the tax title proceedings was not invalid by reason of Petitioner's interpretation of *Milne v. Leiphart,* 119 Mont. 263, 174 P. (2d) 805. The Circuit Court accurately pointed out that in *Milne v. Leiphart,* supra., the sufficiency of the affidavit was a side issue in that particular litigation. It should be pointed out that the Circuit Court did not state, as Petitioner contends, that *Milne v. Leiphart,* supra., was necessarily overruled by *Perry v. Maves,* supra., but that it should be considered overruled only if Petitioner's assumption as to certain facts not disclosed in the record in the *Milne v. Leiphart* case is correct. Even if Petitioner's misconceived construction of *Milne v. Leiphart,* supra., were correct, the decision in the latter case could not be applicable to the instant case. *Milne v. Leiphart* was decided on November 14, 1946. The decisions of the Supreme Court of Montana prior to *Milne v. Leiphart,* supra., which decisions are reviewed in *Perry v. Maves,* supra., consistently uphold the doctrine of *Perry v. Maves* to the effect that the jurisdiction to issue a tax deed is dependent upon the filing of an affidavit of service containing express statements that the notice required by the Montana statutes has been given in the manner required by such statutes. Thus, pursuant to the law of Montana as of the date of the affidavit in the tax title proceedings here in question, to-wit: January 4, 1943, said affidavit and the tax deed issued pursuant thereto were invalid, and even the acceptance of Petitioner's strained construction of *Milne v. Leiphart* could have

no retrospective effect.

II.

Question of Estoppel by Former Action to Quiet Title

The Circuit Court properly found that the judgment roll in the prior quiet title action affirmatively shows that the court in said case did not obtain jurisdiction over the Respondent, May W. Bentley, and that therefore the decree in said action was of no force and effect insofar as it related to her title to the lands in question. Pursuant to *Sec. 9482, Revised Codes of Montana, 1935, (Sec. 93-6206 Revised Codes of Montana, 1947)* (the text of which is set forth in footnote No. 6 of the Circuit Court's opinion) the court in a quiet title action has no jurisdiction to order service of summons by publication unless an affidavit complying with the requirements of said *Sec. 9482* has been filed with such court. *Aronow v. Anderson,* 110 Mont. 484, 104 P. (2d) 2. *Sec. 9482* sets forth four conditions, one of which the plaintiff in a quiet title suit must aver in the affidavit in support of an order for service by publication. These four conditions are: (1) that the defendant resides out of the state; (2) that the defendant has departed from the state; (3) that the defendant, after due diligence, cannot be found within the state; and (4) that the defendant conceals himself to avoid service of process. As pointed out by the Circuit Court, the plaintiff in the prior quiet title action failed to set forth in his affidavit for service by publication any one of the four necessary conditions *even by way of conclusion,* as is shown by the

following quotation from the Circuit Court's opinion:

> "Moreover, a comparison of the affidavit with the four conditions set forth in sec. 93-6206, supra, discloses that it fails to aver, even by way of conclusion, matter sufficient to satisfy any of the required conditions. The court failed to acquire jurisdiction as to May W. Bentley and the decree as to her interests is without force and effect." (p. 8, Circuit Court's opinion)

Petitioner's contention that the repeal of *Sec. 9484* of the Montana Code indicated a legislative intent to relax the existing law requiring the affidavit for publication of summons to set forth in detail all of the evidentiary facts supporting the ultimate facts required to be alleged by *Sec. 9482* is without merit, inasmuch as *Sec. 9482* has not been repealed nor had it been amended at that time. Moreover, even if Petitioner's contention were correct, the failure of the plaintiff in the prior quiet title action to aver in his affidavit any one of the four *ultimate* facts required by *Sec. 9482* is a fatal defect and, as pointed out by the Circuit Court, the trial court in the prior quiet title action could therefore obtain no jurisdiction to order service by publication.

The Circuit Court was cognizant of the later amendments to *Sec. 9482* but held correctly that such amendments were only of prospective effect; nor does the Petitioner dispute this point.

III.

Question of Laches

An examination of the record discloses no evidence whatsoever upon which the Court could consider the

defense of laches. Mere lapse of time does not constitute laches and it is clearly recognized by the courts that the person who seeks to invoke the defense must have changed his position or have been injured by the purported delay. *Johnson v. Kaiser,* 104 Mont. 261, 65 P. (2d) 1179.

In several places in its brief Petitioner contends that the Circuit Court of Appeals failed to consider the defense of laches. Although Petitioner practically waived the defense of laches in its original brief to the Circuit Court, wherein it stated:

> "We do not urge the bar of laches in this case strenuously, as we do not think that a determination of this case depends upon any consideration of laches."

and further did not present said defense in its oral argument to the Circuit Court, the Petitioner strongly urged this defense in its petition for rehearing following the decision of the Circuit Court. In view thereof there can be no merit to Petitioner's contention that the Circuit Court failed to consider the defense of laches.

Conclusion

In Respondents' opinion this case is not encompassed within the boundaries marked out by the United States Supreme Court under its rule 38. No question of federal law is presented. The unanimous decision of the Circuit Court of Appeals was based upon the applicable law of Montana as established by its statutes and the decisions of the Montana Supreme Court. Moreover, no important question of public interest is here involved; the amendments to *Sec. 9482,* which were enacted after

the time here in question, indicate that the decision of the Circuit Court, which is based upon said statute prior to the amendments, can only have limited and not continuing application. It is submitted that the petition for writ of certiorari is without merit and should be denied.

Respectfully submitted,

.....

STERLING M. WOOD
Securities Building
Billings, Montana

Dated at Billings, Montana, May ....., 1956.